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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHEL ZAMUDIO,

Defendant and Appellant.

B291716

(Los Angeles County
Super. Ct. No. PA086215)

APPEAL from an order of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Reversed and remanded.

Elizabeth H. Eng, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkay and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

In August 2016, defendant Michel Zamudio pled no contest to selling, offering to sell, and/or transporting marijuana in violation of Health and Safety Code section 11360, subdivision (a), which at the time was a felony offense.¹ Three months later, California voters passed Proposition 64. That proposition, among other things, reduced most violations of section 11360 from felonies to misdemeanors, and provided a means by which previously convicted defendants could petition for recall and resentencing under the now-reduced penalties.

Zamudio petitioned to reduce his felony conviction to a misdemeanor, which the trial court denied. Zamudio contends, the People agree, and we concur that the trial court erroneously applied Proposition 64 to find Zamudio ineligible for relief, and that the court's order must be reversed. The parties disagree, however, as to the scope of proceedings on remand. The People request a second opportunity either to prove Zamudio's ineligibility for relief or concede that he is eligible. Zamudio argues the People had the burden of proof, did not introduce sufficient evidence to sustain it, and the matter should therefore be remanded with a direction to grant his petition.

We conclude the People can argue and present additional evidence under the correct interpretation of the law, and accordingly reverse and remand for further proceedings.

¹ All further statutory references, unless otherwise noted, are to the Health and Safety Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Offense Conduct

On March 28, 2016, Zamudio was pulled over for a traffic violation. As the police officer was speaking to Zamudio, the officer smelled the odor of raw marijuana emanating from the car. He ordered Zamudio out of the car, conducted a search, and found five bags of marijuana in the trunk. The officer estimated each bag contained about one pound of marijuana.

On August 19, 2016, Zamudio pled no contest to the felony crime of selling, offering to sell, and/or transporting marijuana, in violation of section 11360, subdivision (a), in return for a sentence of three years of probation and ninety days in county jail. As part of the plea allocution, neither the People nor Zamudio proffered any evidence concerning from where Zamudio had obtained the marijuana, or to where he was transporting it.

B. Proposition 64

On November 8, 2016, California voters passed Proposition 64 (The Control, Regulate and Tax Adult Use of Marijuana Act), which among other things, reduced the criminal consequences for certain marijuana offenses. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 64, § 1, p. 178.) Proposition 64 reduced the punishment for any “person who transports, imports into this state, sells, furnishes, administers, or gives away . . . any marijuana” over 28.5 grams from a felony to a misdemeanor except under particular identified circumstances.

(§ 11360, subd. (a)(3).)² One of these circumstances—the only one concededly at issue in this appeal—is that transporting over 28.5 grams of marijuana remains a felony if “the offense involved the import . . . into this state, or the transport for sale . . . out of this state” of the cannabis. (§ 11360, subd. (a)(3)(D).)

Proposition 64 included a provision by which those convicted of cannabis-related offenses prior to November 9, 2016 could petition for resentencing pursuant to the amended laws. (§11361.8.) Section 11361.8, subdivision (a) allows “[a] person currently serving a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense” to “petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal in accordance with Section[] . . . 11360” (§ 11361.8, subd. (a).)

When reviewing a petition filed under this section, “the court shall presume the petitioner satisfies the criteria in subdivision (a) unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria in subdivision (a), the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an

² Offenses involving 28.5 grams or less of cannabis were reduced from a misdemeanor to an infraction. (§ 11360, subd. (b).)

unreasonable risk of danger to public safety.” (§ 11361.8, subd. (b).)

C. Zamudio’s Resentencing Hearing

On June 5, 2018, Zamudio petitioned for resentencing pursuant to section 11361.8. At the hearing, the People argued there was clear and convincing evidence Zamudio transported more than 28.5 grams of cannabis, and this fact alone was sufficient to deny his petition to reduce the offense to a misdemeanor. The People did not introduce any evidence regarding the origination or destination of the transported marijuana. Zamudio’s counsel argued (correctly) that under Proposition 64, whether the amount of cannabis exceeded 28.5 grams was irrelevant if the cannabis was not being imported into or exported out of the state.

The trial court agreed with the People and denied Zamudio’s petition. Because it found Zamudio ineligible for resentencing, the court did not assess whether granting Zamudio’s petition would pose an unreasonable risk of danger to public safety.

DISCUSSION

A. Standard of Review

“Whether defendant’s conviction rendered him eligible for reduction under section 11361.8[, subdivision](e) presents a question of statutory interpretation, which we review de novo.” (*People v. Medina* (2018) 24 Cal.App.5th 61, 66.)

**B. On Remand, Both Parties Are Permitted to
Introduce Additional Evidence on Eligibility
and Whether Recall Would Pose an
Unreasonable Risk of Danger to Public Safety**

As argued by Zamudio, and conceded by the People, the trial court erred in ruling that Zamudio was ineligible for resentencing solely because he had more than 28.5 grams of cannabis in his car. (See § 11360, subd. (a).) Zamudio argues the People did not argue or introduce evidence below showing he had imported or was exporting the marijuana, or that he poses an unreasonable risk of danger to public safety, that the People have therefore forfeited those arguments, and the matter should be remanded with instructions to grant his petition.

In support of his argument, Zamudio relies on two Proposition 64 cases—*People v. Smit* (2018) 24 Cal.App.5th 596 (*Smit*) and *People v. Banda* (2018) 26 Cal.App.5th 349 (*Banda*). In *Smit*, the trial court found a defendant was not entitled to resentencing relief because he had a prior “super strike” conviction under Penal Code section 667, subdivision (e)(2)(C). (See § 11359, subd. (c)(1) [possession of cannabis for sale may still be punished as felony if defendant has one or more prior super strike convictions].) Because that strike did not occur until *after* the defendant’s conviction of possession of marijuana for sale, the Court of Appeal found the defendant was eligible for relief and remanded for the trial court to consider whether granting relief would pose an unreasonable risk of danger to public safety. (*Smit*, *supra*, 24 Cal.App.5th at pp. 603–604.)

In *Banda*, the People opposed dismissal of the defendant’s marijuana cultivation conviction but agreed the offense should be

reduced from a felony to a misdemeanor. (26 Cal.App.5th at p. 353.) The trial court relied on a probation report to deny dismissal, and a divided Court of Appeal held the report inadmissible and therefore that the People failed to carry their burden of demonstrating the defendant was not entitled to resentencing. (*Id.* at pp. 357–361.) Because the People conceded a lack of dangerousness by stipulating to reduction to a misdemeanor (which necessitated a finding of lack of danger), *Banda* held the People had forfeited any dangerousness argument. (*Id.* at pp. 361–362.) The court reversed the order denying dismissal of the sentence and remanded the matter to the trial court. (*Id.* at p. 362.)

In our view, neither *Smit* nor *Banda* supports Zamudio’s argument. In *Smit* (as opposed to the facts here) there was no indication the People had any alternative grounds to argue ineligibility, or requested an opportunity on remand to present further evidence, and thus *Smit* had no need to consider the forfeiture argument Zamudio makes. Like the trial court here, the trial court in *Smit* did not reach the issue of dangerousness, and *Smit* did not find forfeiture but instead ordered the trial court to address it. In *Banda*, the People forfeited any dangerousness argument by conceding to the misdemeanor reduction. No such concession was made here. Moreover, nothing in *Banda* suggests the People were precluded on remand from introducing admissible evidence that the defendant was ineligible for relief—only that the evidence previously introduced was insufficient.

People v. Saelee (2018) 28 Cal.App.5th 744 (*Saelee*), on the other hand, is more instructive. In *Saelee*, the trial court had no admissible evidence before it when it found reducing the

defendant’s offense to a misdemeanor would pose an unreasonable risk of danger to public safety. (*Id.* at pp. 749–750.) The Third District Court of Appeal noted that “the prosecution is required to admit actual evidence” to establish dangerousness, and “[o]n remand, the parties will be allowed to present evidence to support their respective positions . . .” (*Id.* at pp. 749, 756.)³ Zamudio argues *Saelee* is distinguishable because the defendant there requested such an opportunity on remand, whereas Zamudio opposes it. *Saelee*, however, follows the general rule that rehearings on sentencing issues after a reversal for insufficient evidence are permissible. (See, e.g., *People v. Barragan* (2004) 32 Cal.4th 236 [retrial of strike allegation after reversal for insufficient evidence permissible]; *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1255 [“when a reviewing court determines that resentencing is necessary, it may remand the matter for resolution of factual questions”]; *People v. Smith* (2016) 1 Cal.App.5th 266, 275 [holding that after the People argued an erroneous interpretation of the law, matter should be remanded for “a hearing to hear additional evidence”].)

Nothing in the language of Proposition 64 justifies departing from this general rule. Following remand, both the People and Zamudio can present additional evidence, if it exists, regarding eligibility and, if Zamudio is eligible for relief, whether granting his request would pose an unreasonable risk of danger to public safety.

³ *Saelee* elsewhere holds the People’s burden to prove an unreasonable risk of danger to public safety is by a preponderance of the evidence. (28 Cal.App.5th at p. 748.) That question is not presented by this appeal, and we express no opinion on that portion of *Saelee*.

DISPOSITION

The order denying the petition for resentencing is reversed, and the matter is remanded for a further hearing at which both the People and Zamudio will have the opportunity to present additional evidence, if it exists, regarding eligibility and, if Zamudio is eligible for relief, whether granting his request would pose an unreasonable risk of danger to public safety.

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WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.